No. 11,662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See nos. 7482 - 7483

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Ninth Circuit Court of Appeals of the United States:

Comes now appellant, PHILLIP HIMMELFARB, and respectfully petitions this Honorable Court for a rehearing herein of the decision on appeal, upon the following grounds, to-wit:

1. This Honorable Court has misconceived the facts of this case and based its opinion and decision herein upon matters and statements which are not in evidence as to and not a part of the record against appellant, Phillip Himmelfarb;

2. This Court has disregarded the understanding and agreement made and had between the trial court, counsel for the government, and counsel for the re-

spective defendants throughout the trial of this case from its very commencement, that all evidence offered by the government and received in evidence, is offered and received against defendant Sam Ormont only, unless government counsel avowed or indicated that the evidence is offered against the appellant Himmelfarb, or against both defendants;

3. This Honorable Court has misapplied the law to the actual facts of this case, as disclosed by the record against appellant herein, and disregarded the legal principles governing appellate courts in the review of judgments made and entered and proceedings had in a criminal action;

4. This Honorable Court has failed to adequately consider a number of the points raised by this appellant in his appeal herein, and has made assumptions which may not properly be made in a criminal proceeding, and drawn inferences which did not reasonably or logically follow from any established fact or facts.

Implicit in the very nature and purpose of a petition for rehearing is criticism of the decision made or rendered by the Court. The criticism herein leveled at the opinion and decision of this Court springs from a deep and abiding conviction that the appellant was not fairly tried nor justly convicted, and that the decision of this Court in affirming the judgment is grievously erroneous. The sincerity and earnestness of appellant may have prompted him to present this petition with much forcefulness and great vigor. However, this petition and the criticism of the opinion and decision therein contained, is presented and made with due respect and deference to this Honorable Court.

I.

This Honorable Court Has Misconceived the Facts of This Case and Based Its Opinion and Decision Herein Upon Matters and Statements Which Are Not in Evidence as to and Not a Part of the Record Against Appellant, Phillip Himmelfarb.

Appellant has carefully read the opinion of this Court and meticulously compared the facts therein set forth with the evidence in the record against appellant as disclosed by the testimony and exhibits. Such comparison has led appellant to the sincere and earnest belief in the truth and accuracy of the foregoing statement.

Thus the Court states as a fact (Op. p. 2):

> "The books of the Acme Meat Co. were kept on a calendar year basis."

The only testimony in the record respecting the basis, as to fiscal or calendar year, upon which the books of the Acme Meat Co. were kept was that given by government witness, Ernest Link, and the record with respect thereto discloses the following [Tr. Vol. I, p. 450]:

> "Q. (By Mr. Strong): As far as you know from the books and records, or any other basis of knowledge you may have, was the Acme Meat Company operated on a calendar year basis, or a fiscal year basis during the years 1942, 1943 and 1944?
>
> Mr. Katz: Objected to, if the Court please, as to that question, insofar as the defendant Himmelfarb is concerned—
>
> Mr. Strong: We have agreed as to each question. I have not mentioned his name.
>
> The Court: The objection will be sustained. The jury will receive this evidence as against the defendant Ormont only, and disregard it as to the defendant Himmelfarb.

The Witness (Mr. Link): On a calendar year basis.

The Court: It will be assumed that objection will be made to each question, and the same ruling made, as to each one, unless the prosecutor avows that it is offered for connecting the defendant Himmelfarb, or it is obvious from the question that it applies to the defendant Himmelfarb.

Q. (By Mr. Strong): On what basis? A. On the calendar year basis.

Q. On what basis were the books of the Acme Meat Company kept for the years 1942, '43 and '44? A. On a calendar year basis.

Mr. Strong: That is all.

The Court: Cross-examine."

It is obvious from the aforequoted portion of the record that the evidence therein respecting the basis upon which the books of the Acme Meat Company were kept was not admitted as against appellant Phillip Himmelfarb, but was expressly excluded and admitted only against his co-defendant, Sam Ormont. Notwithstanding this fact, this Court in its opinion makes the aforequoted statement as a fact established by the record against appellant, Phillip Himmelfarb, as well as against his co-defendant, Sam Ormont.

Again, this Court in its opinion states as a fact (Op. p. 2):

"According to the evidence, income from sales of meat, made within ceiling prices under OPA, were reported on invoices and recorded in the company books and appellants' returns for 1944 were based on these figures. It is indicated that 'bonus' or 'overceiling' payments of additional cash sums paid by customers of Acme Meat Co. were received but

not reported on the books nor were they reported for income tax purposes for the year 1944; as to all of which both appellants were well aware."

The only witness who testified respecting the phase of the case which in any way pertained to the matters stated as "facts" by this Court in the aforequoted portion of the opinion, was government witness, Ernest Link. Only a meager portion of his entire testimony was admitted against this appellant, and if such portion so admitted against this appellant is properly delineated from the transcript, this Court must determine that the matters set forth by it as facts, in the aforequoted portion of the opinion, are not borne out by or supported by the record.

A fair and accurate evaluation of such testimony discloses no evidence showing, or from which any inference can be drawn which will support such statement recited as a fact by this Court in its opinion (p. 2).

There is not a scintilla of evidence against appellant Himmelfarb respecting the prices or any other entries made by appellant Himmelfarb on the invoices which Mr. Link testified he saw Himmelfarb making out to customers, nor is there a shred of evidence that the invoices which Mr. Link testified he saw Himmelfarb making out to customers were or were not recorded in the company books. Likewise, there is not a particle of evidence that the returns of this appellant for the year 1944 were based on the figures which were "recorded in the company books." Such statements in the opinion of this Court are based wholly upon assumption, conjecture and speculation.

Similarly, there is not a shred of evidence in the record against appellant Himmelfarb showing, or from which an inference may be drawn respecting "bonus or overceiling

payments." The only testimony in the record upon which this Court could possibly have based its statement that "bonus or overceiling payments of additional cash sums paid by customers of Acme Meat Co.," etc., is that of Mr. Ernest Link that [Tr. pp. 430, 434, 435]:

"I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office."

* * * * * * * *

"Q. (By Mr. Strong): What did you observe in connection with that list? A. I saw on the list the names of customers and the amounts placed opposite those names of the customers. Sometimes they were written in the handwriting of Mr. Himmelfarb, and sometimes in the handwriting of Mr. Ormont. Some of them were marked 'Paid' and crossed out; some of them were left open, and not crossed out."

* * * * * * * *

"Q. Did you record any of the amounts from that list you have spoken of into the books and records which you kept of the Acme Meat Company? A. No.

Q. (By Mr. Strong): With reference to Mr. Himmelfarb—

The Court: Did you ever examine that list? A. That one time.

Q. One time? A. Yes.

Q. You say there were names of people on the list? A. Yes.

Q. And figures? A. Yes, I had half an hour's time to study it."

It should be observed that in order for this Court to have arrived at the conclusion that such testimony "indicated" what the Court found to be "indicated" thereby, this Court was required to make and did make a number of dehors the record assumptions:

a. The assumption that the multiplication of the weight by the figure 3 resulted in a monetary total;

b. That such monetary total was an additional charge to and paid by the customer, rather than a discount or rebate allowed and paid to the customer;

c. That such computation was part of a transaction between the Acme Meat Co. and the customer, and not a record of account between the Acme Meat Co. and a third person, such as the amount due to the slaughterer for slaughtering of the head of beef, or the extra services in connection with the slaughtering thereof (see Opinion, Second Para., pp. 11-12); or the amount or percentage due to a sales manager or salesman or cattle buyer in connection with the sale by Acme Meat Co. of the particular beef, or commission due the cattle buyer for the purchase thereof on behalf of Acme Meat Co.

In short, this Court assumed a hazy, nebulous reference to an unexplained record to be a record of income rather than a record of expense and outgo, without any evidence whatever to support such assumption, in violation of every fundamental rule governing criminal proceedings, including the basic tenet of our system of jurisprudence that every person is deemed to be innocent of crime and wrongdoing.

It appears to appellant that the use by the Court of the word "indicated" in the statement that "It is indicated

that 'bonus' or 'overceiling' payments of additional cash sums paid by customers of Acme Meat Co. were received but not reported," etc., concedes by implication, at least, that the evidence does not directly establish same as a fact. The word "indicated," among other things, connotes "hint" and "suggestion." However, if what the Court says is "indicated" by the evidence is merely "hinted" or "suggested" thereby, then speculation and surmise becomes and is the sole pathway to the conclusion.

Moreover, by assuming that "both appellants were well aware" of what this Court assumed the evidence "indicated," the Court piled mere guess upon simple assumption.

This Court in its opinion states (pp. 2-3):

> "Further, there is testimony that income from certain sales was shown on invoices which were not transmitted to the appellants' bookkeeper and therefore were never entered nor included in the books from which the income returns were made. These unreported invoices or lists were kept in a desk drawer at the plant. There is also indication of some falsity in keeping of records which goes to the general intent of appellants to misrepresent their income."

A careful review of all of the testimony of Mr. Link which is in the record against appellant Phillip Himmelfarb, and which is the only testimony that in any way pertains to the phase of the case bearing upon the matters included in the foregoing quotation from the opinion of this Court, establishes that such statement is a mere extension of an unsupported and unsupportable assumption dehors the record made by this Court.

Preliminarily, however, to any further discussion of the aforequoted statement, appellant respectfully directs this Court to the confusion which results from the designation by this Court of the "lists" as "invoices" or "unreported invoices," or vice versa. The only witness who testified respecting a "list" was government witness Link, who referred to it by that term "list." He did not at any time refer to the "list" as an "invoice," nor to any "invoice" or "invoices" as a "list." Nor was any reference at any time made by anyone to a "list" as an "invoice," or vice versa. The testimony of Link respecting the "list" is in the record against appellant Himmelfarb, and may properly be considered by this Court for what it is worth.

On the other hand, there is testimony in the Reporter's Transcripts [pp. 398-401, pp. 416-417], with respect to unrecorded invoices for the year 1942, which is not in the record against appellant and is only in evidence against defendant Sam Ormont. The distinction between the "list" and "unrecorded invoices" is vital to appellant for many reasons, among which are:

1. If the Court by its reference to "unreported invoices or lists" is indiscriminately referring to both the "unrecorded invoices" and the "list," it is, with respect to the unrecorded invoices, considering and applying against appellant Himmelfarb as evidence matters and things which are not in the record against him at all;

2. If the Court by its reference to unreported "invoices or lists" is indiscriminately referring to both the "unrecorded invoices" and the "list," this Court, in violation of appellant's most basic rights, is disregarding the hereinbefore mentioned understanding and agreement made and had by and be-

tween the trial court, counsel for the government and counsel for the respective defendants, under and pursuant to which this case was tried and determined;

3. This Court by designating a "list" as an invoice or unreported invoices, affixes and attaches to the word "list" a meaning and connotation which the word "list" does not have, possess, or convey, to appellant Himmelfarb's serious and irreparable detriment. The word or term "invoice" means "a written account, or itemized statement, of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the quantity, value or prices, and charges annexed," and refers to sale, which implies income, and when the term "invoice" is modified by the adjective "unreported," such invoice is designated and characterized as one which has not been entered on, is not reflected by the books, and has not been included in and declared as income. A list, on the other hand, is "a roll or catalog, as of names or items; a register, inventory, or classified record or memorandum," and does not denote income or necessarily have any connection with or pertain thereto.

The importance of this distinction is emphasized by the Court's further statement in its opinion immediately following its reference to "unreported invoices or lists" that (p. 3), "There is also some indication of some falsity in keeping of records which goes to the general intent of appellants to misrepresent their income." Obviously, the existence of "unreported invoices" would have the effect declared by the Court. The keeping and existence of a mere list could and would have no such effect.

The record does establish, it is true, that a list was kept in a desk drawer of the plant, and that Mr. Link did not record any of the amounts from that list in the books and records of the Acme Meat Co. However, the evidence does not show, and this Court merely assumes that the list represented a record of business transactions from which book entries are required to be made, and not a mere computation based upon or made from, or an analysis of some primary record, and from which no entry or postings are required to be made in the ordinary and regular course of keeping books and records.

The Court must distinguish between vouchers and memoranda resulting in accounting entries and those which have no affect upon the books and records of a business, and it is undoubtedly the failure to recognize such distinction which led the Court into the unwarranted and erroneous assumption that there was an "indication of some falsity in keeping of records."

This Court in its opinion (p. 3) makes a statement that:

> "Evidence is in the record of a partnership return declaring additional income of some $71,000.00, claimed to have come from the so-called 'Miscellaneous Enterprises,' bank records and bank documents pertaining to each appellant, records of business dealings, invoices, cancelled checks, transcripts of portions of the records of the Acme Meat Co. and bond records."

There is no evidence in the record against appellant Himmelfarb of any "invoices" or "transcripts of portions

of the records of Acme Meat Co.," nor for that matter, of "bond records," unless, of course, this Court construes the inclusion in appellant Himmelfarb's statement of net worth of the value of his war bonds as an asset as a "bond record(s)."

Moreover, even the bank records and bank documents and records of business dealings and cancelled checks which are in evidence against appellant, Himmelfarb, were not in any way ever connected up with the offense with which he was charged, and consequently are not only improperly in the record, but actually constitute no evidence at all.

As a matter of fact, this Court conceded that the bank records were not connected with the charge of which appellant was accused, by declaring with reference thereto (Op. p. 36):

> "In considering the evidence, it is doubtful whether the government properly connected this evidence with the offense charged; . . ."

This statement of the Court may with equal propriety be applied to all of the other evidence received against appellant Himmelfarb.

This Court on page 29 of its opinion, and in that portion of it designated "Specifically as to Himmelfarb," states:

> "Mr. Eustice and Mr. Phoebus, agents for the Bureau of Internal Revenue, began investigations in November, 1945, to determine Himmelfarb's status with the Acme Meat Co., and whether he had paid

the proper tax for the year 1944. On the basis of these investigations, Eustice determined that Himmelfarb had received additional unreported income for that year."

By such conclusion it is apparent that this Court rejected the contention and argument made by appellant Himmelfarb (Rep. Br., pp. 14-16, incl.) that Eustice had merely testified that he had made a determination on the basis of his investigation as to whether or not there was any additional income for the year 1944 over and above that reported by appellant, but that Eustice did not by his testimony disclose what such determination was—that is, whether he had determined that there was such additional income or whether he had determined that there was no such additional income.

Because appellant verily believed that his contention was tenable and that this Court would so construe such testimony, appellant made and advanced no contention on the basis of a contrary interpretation. Counsel for appellant would be remiss in his duty if he did not now direct this Court's attention in the strongest possible manner to the fact that the statement by Mr. Eustice, if construed as testimony that appellant received additional unreported income for the year 1944, not only represents the bald conclusion of an investigator respecting the primary issue in this criminal proceeding, but a conclusion based upon hearsay and matters dehors the record, and which was improperly admitted over the timely objection of appellant.

As a matter of fact, this Court impliedly, at least, recognized such conclusion to be based upon hearsay and matters dehors the record by the following statement, and particularly the italicized portions thereof which are quoted from the opinion of this Court (last para., pp. 29-30):

> "Eustice, in determining that appellant had additional income for the year 1944, used information secured from his individual income return for that year, the 1945 partnership return, *investigation of the books and records of the Acme Meat Co., and information from the statements of other government agents.*"

This is true for a number of reasons:

a. No books or records of the Acme Meat Co. are in evidence in this case at all; no evidence respecting the contents of any books or records of Acme Meat Co. were admitted against appellant Himmelfarb, and the testimony of Mr. Eustice based upon his investigation of such books and records is, of necessity, a conclusion based upon matters and things dehors the record;

b. There are no "statements of other government agents" of any kind or character in evidence against appellant Himmelfarb, and information from the statements of other government agents is, and can only be hearsay as well as dehors the record.

The decision of this Court sanctioning an opinion and conclusion of an investigator based upon hearsay and matters dehors the record, directed to the primary issue upon which the jury was required to find, as a fact, and

the affirmance of the judgment upon such testimony, represents a radical and dangerous departure from established legal principles and precedents.

Expert testimony in income tax cases directed to the primary issue upon which the jury must find, *viz.*, whether there has been additional unreported income, has been sustained by the Supreme Court of the United States upon the ground that the witness was qualified as an expert, *and based his opinions and conclusions upon the testimony and exhibits in evidence.*

United States v. Johnson, 63 S. Ct. 1233, 319 U. S. 503, 519;

See, also:

United States v. Schenck, 126 F. 2d 702, 709;

Rose v. U. S., 128 F. 2d 622.

No case has been cited by the government or this Court, and counsel for appellant is convinced that no case can be found in which the opinions and conclusions of an investigator, based upon hearsay and matters dehors the record, has been sanctioned or sustained.

To permit such evidence to stand and to constitute the basis for a conviction in a criminal proceeding, and the affirmance of a judgment of conviction upon review by an appellate court, is violative of every fundamental principle of American jurisprudence.

II.

This Court Has Disregarded the Understanding and Agreement Made and Had Between the Trial Court, Counsel for the Government, and Counsel for the Respective Defendants Throughout the Trial of This Case From Its Very Commencement, That All Evidence Offered by the Government and Received in Evidence, Is Offered and Received Against Defendant Sam Ormont Only, Unless Government Counsel Avowed or Indicated That the Evidence Is Offered Against the Appellant Himmelfarb, or Against Both Defendants.

There is and can be no dispute that this case was tried upon the agreement and understanding above mentioned. Excerpts from the transcripts embodying the understanding and agreement, and illustrative and indicative of the tenor thereof were set forth in appellant Himmelfarb's Opening Brief (pp. 3-4), and such understanding and agreement is and must be deemed to be an admitted fact.

Notwithstanding such fact this Court, as hereinbefore and as hereafter shown, has repeatedly referred to, considered and applied against appellant Himmelfarb evidence which was not admitted against him and which was not in the record at all as to him. This Court has gone even further. It has found and declared appellant Himmelfarb guilty by association. This Court said with respect to the two defendants (Op. p. 38):

> "The two were trial (*sic.* tried) together and the two ran a business together, and for the most part acted jointly throughout so that most of the evidence in conduct of that business would be properly related to both defendants."

It thus shockingly appears that this Court considered the fact that the two defendants were tried together as an element determinative of the proposition that most of the evidence would be properly related to both defendants, even though most of the evidence was not admitted against appellant Himmelfarb, but expressly excluded from the record as to him.

Similarly, this Court considered the fact that the two defendants ran a business together as another element determinative of the proposition that most of the evidence would properly be related to both defendants, even though most of the evidence was not admitted against appellant Himmelfarb, but expressly excluded from the record as to him.

In short, notwithstanding the fact that the evidence respecting the conduct of the business operated by appellant Himmelfarb and Sam Ormont is not in the record against this appellant, this Court, in the face of the record and contrary to the most basic and inviolable legal principles, nonetheless applies against and relates to appellant Himmelfarb all such evidence simply on the basis that the two defendants were tried together and ran a business together.

III.

This Honorable Court Has Misapplied the Law to the Actual Facts of This Case, as Disclosed by the Record Against Appellant Herein, and Disregarded the Legal Principles Governing Appellate Courts in the Review of Judgments Made and Entered and Proceedings Had in a Criminal Action.

A. Re: The Privileged Communications by Appellant and Appellant's Attorney to Malin, the Accountant.

This Court in its opinion herein held that the testimony of William S. Malin, the accountant employed by appellant Himmelfarb's attorney, Mr. Mirman, were not privileged communications and therefore inadmissible as such, upon two grounds:

1. That "Malin's presence was not indispensable in the sense that the presence of an attorney's secretary may be; it was a convenience, which, unfortunately for the accused, served to remove the privileged character of whatever communications were made"; and

2. That Himmelfarb, being aware of Malin's employment, by participating in one or more meetings with Malin and Mirman relative to his income taxes and signing some exhibits at Malin's request, thereby authorized the disclosures by Mirman to Malin.

In so holding this Court fell into serious error respecting an important and far-reaching principle of law, and rendered a decision directly contrary to the only adjudicated Federal Court case on the point, to-wit: *Lalance*

& Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563, and contrary to the law generally prevailing in the several states, as well as at common law.

In that case it is held that the rules of privilege applicable to communications between attorney and client, or counsel and associate, govern communications of a party to patent litigation, or his counsel, with an expert in the art in question employed by the party to manage the litigation in his behalf, or with such an expert employed as assistant to counsel insofar as he acts as such assistant and not as a witness.

In that case the complainants had employed an expert to assist complainants in the presentation of their patent litigation. In determining whether or not a letter written by complainants to such expert was privileged, the Court declared:

> "In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the *alter ego* of the complainant; and the privilege which public policy secures to the individual litigant could not be secured to the corporation litigant unless it was so extended as to include him. So too, questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such case it would seem fair to apply the same rule to the expert as to the counsel. It would seem, however, that in such case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies."

The Court in that case further declared:

> "It does, however, appear that he was retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness did seem to come within the privilege suggested in the former memorandum—as similar to that of counsel. More careful reflection has still further confirmed the impression that such privilege should be forfeited if the 'scientific counsel' assumed the role of a witness."

In *Walshon v. Stainton,* 71 Reprint 357, 2 Hem. & M. 1, it was directly held that communications by an attorney and the client to an accountant employed by the attorney were confidential communications and privileged as such, declaring:

> "The principle is established that where a person has occasion to employ a solicitor, and the solicitor, in order to enable himself to advise on the matter, calls in some other person to assist him and to give his opinion, such communications are as much privileged as if they came from the solicitor himself. In such a case the person called in (here it was an accountant) is *pro hac vice* the solicitor's clerk."

Indispensability of the clerk or agent is not the test which determines whether the communication is privileged or unprivileged, and this Court's conclusion that the presence of the accountant was a mere convenience which removed the privileged character of the communications, is contrary to precedent and unsupported in law.

It has been repeatedly held that the privilege extends to confidential communications between the client and the

clerk or agent of the attorney, which, as hereinabove shown, includes an accountant.

Bowman v. Norton, 5 C. & P. 177, 24 E. C. L. 265, 172 Reprint 929;

Taylor v. Forster, 2 C. & P. 195, 12 E. C. L. 85, 172 Reprint 89;

Churton v. Frewen, 2 Dr. & Sm. 390, 62 Reprint 659, 670;

Hawes v. State, 7 So. 302, 312, 88 Ala. 37;

Landsberger v. Gorham, 5 Cal. 450, 451, 452;

Indianapolis v. Scott, 72 Ind. 196, 204;

Sibley v. Waffle, 16 N. Y. 180, 183;

Brand v. Brand, 39 How. Pr. 193, 260, *et seq.;*

Jackson v. French, 3 Wend. 337, 20 Am. D. 699, 700.

It will be noted by this Court that in *Churton v. Frewen, supra,* the rule of privileged communications was held to apply to a translator of ancient documents, who was employed by the solicitor for that purpose; that in the *Lalance, etc., v. Haberman* case, *supra,* the privilege was held to apply to an engineer or patent expert employed by the party to assist in the preparation and presentation of its case.

Can this Court say that a translator of ancient documents is more indispensable and less of a convenience in a case requiring the services of such a translator than an accountant in a case requiring the services of an accountant? Similarly, can this Court say that an engineer or patent expert is more indispensable and less of a con-

venience in a case requiring the services of such engineer or tax expert than an accountant in a case requiring the services of an accountant? It should be remembered, moreover, that in *Walshon v. Stainton, supra,* the privilege was specifically held to apply to an accountant employed by an attorney.

The privilege likewise extends to confidential communications between the principal's attorney and the clerk or agent of such attorney, and prevents the agent, as well as the attorney from testifying thereto.

McFarlane v. Rolt, 14 Eq. 580, 27 Law Times Reports, 305, 306;

Ried v. Langlois, 2 Hall. & T. 59, 73, 47 Reprint 1596, 1602;

Russell v. Jackson, 9 Hare 387, 41 Eng. Ch. 387, 68 Reprint 558, 559;

Webb v. Lewald Coal Co., 4 P. 2d 532, 214 Cal. 182, 187, 77 A. L. R. 675;

Philadelphia Fire Assn. v. Fleming, 3 S. E. 420, 422, 423, 78 Ga. 733;

Indianapolis v. Scott, 72 Ind. 196, 204;

Leyner v. Leyner, 98 N. W. 628, 629, 123 Iowa 185;

State v. Loponio, 88 Atl. 1945, 85 N. J. Law 357, 361, *et seq.,* 49 L. R. A. (N.S.) 1017;

LeLong v. Siebrecht, 187 N. Y. Supp. 150, 196 App. Div. 74, 76.

In none of the foregoing cases was indispensability of the presence of the clerk or agent declared to be or even mentioned as the test for the existence of the privilege, or mere convenience fixed or determined as the basis for

the loss of such privilege, nor was the fact that the client was aware of the employment of the clerk or agent or participated in meeting or communicating with such clerk or agent, held to be a waiver of the privilege or an authorization to disclose the communications. As a matter of fact, such cases indicate that it is the awareness by the client of the existence of the relationship of clerk or agent in making the disclosure which furnishes the basis for the privilege.

Moreover, the question before this Court is not whether the "disclosures made by Mirman to Malin" were authorized by the accused, but whether Malin may disclose to any person communications, either orally or in writing, made to him in confidence by the accused, or by Mr. Mirman, the then attorney for appellant.

Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. (following Sec. 687) provides:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Under the common law, as hereinbefore shown, the rule of privileged communications extended to clerks and agents of the attorney, which includes accountants when so employed by the attorney.

As indicated by the foregoing cases, the test that this Court should have applied in determining whether the communications to Mr. Malin were privileged, and therefore inviolate, was whether he was, in fact, an agent of the attorney for the accused. By the failure of this

Court so to do, and the use by it of a false and incorrect test or standard of measurement, this Court was led to a conclusion completely at variance with the adjudicated cases on this question and the law generally prevailing.

B. Re: The Error in the Admission of the Bank Records.

This Court in its consideration of appellant's contention that the admission of the bank records over objection of appellant was error, states (Op. p. 36):

> "The bank records, over objection of Himmelfarb, were admitted to show income for the year 1944 and, along with other evidence in the case, constituted a part in the chain of circumstances proving guilt."

By such statement this Court considered such evidence as being properly in the record and entitled to consideration as part of the circumstantial chain of proof.

In the very next sentence of its opinion, however, the Court declares that even if the admission were assumed to be in error, it was harmless error and appellant was not prejudiced thereby. In the sentence immediately following the foregoing declaration the Court acknowledges that the government argued to the jury that such bank records "show how much money came into appellant's account," and then states with respect thereto in the next succeeding sentence that (Op. p. 36):

> "In considering the evidence, it is doubtful whether the government properly connected this evidence with the offense charged; however, in the circumstances we do not find reversible error. Eustice, who examined the account, stated that he did not actually use it in the computation of the taxpayer's income as corrected, but only for informational purposes."

There is and can be no question whatever that the government did not connect, even remotely, the bank records with the offense charged, and the error of the admission of such evidence, over objection, and the subsequent refusal to strike same upon motion of appellant, cannot be justified on the basis as to whether or not Mr. Eustice did or did not use such evidence in the computation of the taxpayer's income, but must be determined solely on the basis of whether the jury considered such evidence in arriving at their verdict, as it was urged to do by counsel for the government in his argument to them.

Where, as in the instant case, this Court cannot say that the jury did not consider such evidence in arriving at its decision, such evidence must be deemed to be prejudicial.

Kattrell v. U. S., 79 F. 2d 259, 262, and *Williams v. U. S.*, 168 U. S. 382, 395, 396, 397, flatly hold that the admission of bank records without any evidence connecting same with the offense charged is error, and the latter case holds that such error is reversible error where the accused *may* have been prejudiced thereby.

It appears to appellant that this Court is inconsistent in holding, as it does, that although it is doubtful whether the government properly connected up the bank records with the offense charged, any error in such admission was harmless and not prejudicial because a government witness Eustice testified that *he did not use* it in the computations made by him, but that such evidence nonetheless constituted a part in the chain of circumstances proving guilt.

In *Nicola v. U. S.*, 72 F. 2d 780, 782, 783, the Court had occasion to pass upon the error in the admission of

a letter, which like the bank records in the instant case, was not shown to be relevant or material to or connected up with the offense charged, and said with respect thereto (p. 783):

> "Its admission was clearly erroneous, and unless it appears 'beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the parties duly objecting,' a new trial should be awarded."

In *Eierman v. U. S.*, 46 F. 2d 46, 49, the Court held that in jury trials the erroneous admission of evidence is presumptively injurious and warrants a reversal unless it affirmatively appears that it was harmless.

It has repeatedly been held that it is not necessary for an appellant to show that the error relied upon was prejudicial, and where substantial error occurred which, within the range of reasonable possibility may have affected the verdict of the jury, it is ordinarily presumed to be prejudicial and to require reversal.

The rule that should govern the Court in the determination of this case is that laid down in *Antietam Paper Co. v. Womble,* 294 Fed. 795, 798, wherein it was held that the Court will not assume that incompetent evidence improperly admitted was without affect upon the jury where it was of such a character as to have a material bearing on the principle issues.

This Court in citing and quoting from *Gleckman v. United States,* 80 F. 2d 394, 399, to support its holding with respect to the admission of the bank records as evidence, misapplies the law of that case to the facts of the instant proceeding. It was not shown in this case, as in the *Gleckman* case, that defendant was "constantly day by day and month by month receiving moneys and de-

positing them to his own use," nor was there any evidence here, as in the *Gleckman* case, to prove that such deposits as were made in appellant's bank account represented income which was not accounted for, or income at all.

C. Re: The Insurance Policy—Exhibit 44.

It is apparent from the Court's statement (Op. pp. 36-37) that:

> "The evidence further shows that Himmelfarb acted somewhat irregularly in transferring the policy from himself to Sam Ormont and himself, doing business as Acme Meat Co., which bears upon his general conduct in business and sheds light on the element of intention,"

that the Court misunderstood appellant's contention and argument with respect thereto, in view of the fact that the Court finds that the evidence established appellant and Sam Ormont to be partners in the conduct and operation of the Acme Meat Co. There is and was no irregularity in the transfer of such policy if appellant and Sam Ormont were actually partners. The irregularity in the transfer of the policy existed only if the transfer was made by appellant from himself to Sam Ormont and himself, as partners, if in fact they were not partners, but were employer and employee.

Counsel for the government in his argument to the jury [Tr. pp. 1484-1485], stressed the irregularity of the transfer of the policy, Exhibit 44, to the partners, on the basis that the relationship was otherwise, declaring:

> "So there is evidence in this case right at the outset that Mr. Himmelfarb is also not telling everything. That you can take into account in determining not

only what his relationship was to Mr. Ormont and what part of that money was his and what he got, but also can take that into account in determining willfullness. Willfullness is a very important term here, as his Honor will tell you more about later. *But bear in mind these little indications of willfullness. It doesn't say on his return that he is a co-partner, it says here that his employer is Sam Ormont, doing business as Acme Meat Company.*"

Irrespective of what the insurance policy and statements and the monthly reports in connection therewith may have shown, there can be no question that such insurance policy and reports had no connection with or relationship to the payment of income taxes.

D. Re: The Net Worth Statements—Exhibits 50 and 50A.

This Court appears to justify the admission in evidence of the net worth statements, over objection, on the basis that:

(1) The trial court did not hold the mere possession of assets as the basis for the verdict herein; and

(2) The net worth statements were pertinent in establishing an accumulation of income, and therefore relevant.

Appellant is unable to comprehend the significance of this Court's statement that the trial court did not hold that the mere possession of assets was the basis for the verdict herein. There was never any occasion for the trial court to so hold, and there was no issue before the trial court respecting the basis for the verdict.

What significance or importance the trial court attached to the net worth statement is of no moment whatever in this case. The real question is what significance or importance did the jury attach to these net worth statements?

Because this Court is unable to probe the minds of the jurors and determine that question, the error in the admission of such statements, under the authorities both heretofore and hereafter cited, is real and prejudicial.

A mere net worth statement in and of itself does not establish the source or origin of the assets shown, and consequently in and of itself is not pertinent in establishing an accumulation of income. That is true of the net worth statements, Exhibits 50 and 50A received in evidence herein.

Admittedly, there is no testimony respecting the source or origin, or the period during which the assets were acquired which are shown by and reflected in the statement of net worth. This Court by its assertion that the net worth statement is merely a part of the evidence which goes to show appellant Himmelfarb's income in the general period involved, establishes that it momentarily lost sight of or misconceived the nature, purpose or effect of a net worth statement. A net worth statement does not show income at all, but merely assets, liabilities, and the excess of one over the other as of a given date.

This Court has fallen into the same error into which the jury was led by the admission in evidence of the statements of net worth, and the urging by counsel for the government that the jury fasten guilt upon appellant upon the basis of the statements of net worth and their speculation and conjecture as to the manner and method in which he acquired such net worth.

The Court declares (Op. p. 37):

> "The case is quite clear that Himmelfarb had a large source of income in 1944 and that his general conduct suggests and proves evasion of taxes thereon in the proper period."

The Court, however, appears to find this case "quite clear" upon the basis of exhibits received over objection, and whose admission at least in part is justified only on the basis that it did not create such prejudice as would amount to reversible error.

IV.

This Honorable Court Has Failed to Adequately Consider a Number of the Points Raised by This Appellant in His Appeal Herein, and Has Made Assumptions Which May Not Properly Be Made in a Criminal Proceeding, and Drawn Inferences Which Did Not Reasonably or Logically Follow From Any Established Fact or Facts.

A. Re: The Application for and Cashier's Check—Exhibits 34 and 35.

The Court fails entirely to consider appellant's contention respecting Exhibit 35, the cashier's check payable to Acme Meat Co., issued upon the application, Exhibit 34, of appellant's wife, which did not and could not under any circumstances represent income at all, or in any wise be relevant to the offense of income tax evasion. To hold that a number of irrelevant and unconnected documents may be admitted in evidence and the jury invited to consider same in arriving at guilt, which consideration can only involve surmise, speculation and conjecture is not prejudicial, is to ignore reality.

B. Re: Misconduct of Counsel for the Government in Argument to Jury.

A part or portion of the argument of counsel for the government which is cited as misconduct herein by appellant is excused and justified by this Court on the basis that such part or portion of the argument was based upon

the evidence in the case and that which may reasonably be inferred therefrom. Such justification must of necessity follow in light of the fact that this Court has fallen into the same error of applying against appellant Himmelfarb evidence which is not in the record at all, as well as evidence which was admitted only as against his co-defendant Sam Ormont.

This Court does, however, recognize in some respects at least the impropriety of a part or portion of the argument made by counsel for the government, and states in its opinion with respect thereto (Op. p. 39):

> "We do not think that counsel for government should have used this failure to produce certain witnesses or to have drawn it to the jury's attention, for he was in no way bound to produce them."

However, this error too is excused by the Court because of a lack of prejudice and objection.

This Court acknowledges that under the rule of *Skuy v. U. S.*, 261 Fed. 316, that where error is seriously prejudicial it will be noticed by the reviewing Court in the absence of objection. The question then becomes one of whether or not such an error is seriously prejudicial. Certainly an argument by counsel for the government that two persons were accessible as witnesses to appellant and were not called by him, and implying and inferring that they would have given testimony adverse and prejudicial to appellant if called, results in the deprivation of the presumption that the defendant is innocent to the same extent and degree as does an argument directed to the fact that the defendant did not himself take the stand.

It has been repeatedly held that an argument of government counsel calling the attention of the jury to defendant's failure to take the stand is reversible error.

**McKnight v. U. S.,* 115 Fed. 972, 982;
Robilio v. U. S., 291 Fed. 975, 985.

In the *McKnight* case the Court held that it was prejudicial error for the Court or counsel to call to the attention of a jury in a criminal case in any manner the right of the defendant under the statute to testify in his own behalf. In the *Robilio* case, the Court held that remarks by the District Attorney manifestly designed to direct the attention of the jury to the failure of the defendant to testify would constitute reversible error unless otherwise overcome.

Anent the question of excusing or justifying improper argument of government counsel on the theory that it was invited or provoked by argument of counsel for defendant, it was held in *United States v. Toscano,* 166 F. 2d 524, 526, 527, in a prosecution for unlawfully possessing narcotics, that the summation of government counsel that a package which contained the narcotics might show defendant's fingerprints was improper, even though provoked by reference by defendant's counsel to facts outside the record, where government introduced no evidence to show any fingerprints, and the error was not eliminated

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*This case is not the same as, but is the decision on the second appeal of the case of *McKnight v. U. S.,* 97 Fed. 208, cited in appellant Himmelfarb's Opening Brief.

by the judge's statement that the jury was to decide the case only on the evidence.

In *Richardson v. U. S.*, 150 F. 2d 58, 64, the Court, in considering improper argument by counsel for the defendant, declared:

> "Whether or not these appellants are guilty is not for us to decide, and as above indicated, there is sufficient evidence to support submission to the jury of the first count of the indictment. Appellants, however, were entitled to a fair trial, and they did not receive it."

See, also, *Taliaferro v. U. S.*, 47 F. 2d 699, in which this Court analyzed in detail and extensively discussed the position of counsel for the government and his scope and duties in the argument of a criminal proceeding, and in an opinion written by Judge Sawtelle, in which Wilbur and Rudkin concurred, reversed the case because of improper argument.

While it is conceivable that one error of an inconsequential nature may be harmless and not prejudicial, the greater weight of probability and logic should lead to the conclusion that the accumulated effect of a number of errors must of necessity be harmful and prejudicial. In the instant case, there was not a single isolated inconsequential error, but a number of errors, and the effect thereof was the cumulative effect of the total.

The Supreme Court of the United States has in two comparatively recent cases had occasion to consider the question as to whether error was harmless or prejudicial.

In the most recent of these two cases, to-wit: *Fiswick v. U. S.*, 329 U. S. 211, the Court referred to its earlier but nevertheless late case of *Kotteakos v. U. S.*, 328 U. S. 750, in which it reviewed the history and function of the "harmless error" statute (Jud. Code, Sec. 269, 28 U. S. C. 391), and quoted therefrom as follows (pp. 764-765):

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

See, also,

United States v. Negro, 164 F. 2d 168, 171;

Bollenbach v. U. S., 326 U. S. 607, 615.

Specifically, with respect to the matter of improper argument by counsel for the government, the Court, in *Coulston v. U. S.,* 51 F. 2d 178, 182, in considering and discussing the proposition respecting the claim that the

conviction was upon abundant evidence, and that the errors complained of were not prejudicial, quoted with approval from *Miller v. Territory of Oklahoma,* 149 Fed. 330, 339, 9 Ann. Cas. 389, as follows:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

Finally, this Court in its decision herein should be guided by the statement of the United States Supreme Court in the recent case of *Bollenbach v. U. S.,* 326 U. S. 607, 615:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to

presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Respectfully submitted,

WILLIAM KATZ,
Attorney for Appellant, Himmelfarb.

The undersigned attorney for appellant Phillip Himmelfarb hereby certifies that in his judgment the foregoing petition for rehearing is well founded, and is not interposed for delay.

WILLIAM KATZ.